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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

DELTAKEEPER, Plaintiff and Appellant, v. OAKDALE IRRIGATION DISTRICT et al., Defendants and Respondents.	C049798 (Super. Ct. No. 04CS00188)
DELTAKEEPER et al., Plaintiffs and Appellants, v. MERCED IRRIGATION DISTRICT et al., Defendants and Appellants.	(Super. Ct. No. 04CS00227)
DELTAKEEPER et al., Plaintiffs and Appellants, v. SOUTH SAN JOAQUIN IRRIGATION DISTRICT et al.,	(Super. Ct. No. 04CS00228)

Defendants and Appellants.

These cases, consolidated for appeal, involve questions whether irrigation districts violated the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.[1] (CEQA)) by adopting negative declarations[2] instead of preparing environmental impact reports (EIRs) for programs applying aquatic herbicides/pesticides[3] to keep irrigation canals clear of weeds and algae. Environmental review of these long-standing programs was newly triggered by permit requirements of the State Water Resources Control Board (SWRCB) to satisfy federal law (National Pollution Discharge Elimination System (NPDES) permits under the Clean Water Act, 33 U.S.C. § 1251 et seq.).

In the trial court, various groups filed petitions for writ of mandate against various irrigation districts and state agencies, alleging CEQA violations. The cases were not consolidated in the trial court but were all assigned to one judge. This consolidated appeal involves the following trial court proceedings:

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[1] Undesignated statutory references are to the Public Resources Code.

[2] A negative declaration is "a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report." (§ 21064; Cal. Code Regs., tit. 14 (Guidelines) §§ 15371, 15071.)

[3] We adopt the parties' usage of the term "pesticide," which includes chemicals used to kill weeds. (Webster's New World Dictionary (3d college ed. 1988) p. 1009.)

1. Deltakeeper[4] sought a writ of mandate against Oakdale Irrigation District and its Board of Directors (collectively Oakdale); the Governor's Office of Planning and Research (OPR); OPR's acting director Jan Boel; and the State Clearinghouse and its director Terry Roberts (collectively the State). Deltakeeper complained, among other things, that inadequate time was allowed for public comment. The trial court found a CEQA violation but no prejudice and therefore denied the writ petition. Deltakeeper appeals.

2. Deltakeeper, San Joaquin Raptor Rescue Center, Protect Our Water, and Central Valley Safe Environmental Network (collectively Deltakeeper, for ease of reference[5]) sought a writ of mandate against Merced Irrigation District (Merced) and the State. The trial court held Merced abused its discretion in adopting a negative declaration, and the evidence supported a fair argument that the program had potential significant impacts to natural habitat and groundwater. Merced appeals. Deltakeeper cross-appeals, complaining the trial court denied a

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[4] Deltakeeper described itself in its verified petitions as a fictitious business name for Waterkeepers Northern California, a nonprofit public benefit corporation. Deltakeeper says it has approximately 2,000 members in the San Francisco Bay and Sacramento-San Joaquin Delta areas, and it is dedicated to environmental protection.

[5] In the two cases where Deltakeeper was joined by other petitioners, our reference to "Deltakeeper" includes all petitioners.

motion to augment the record and failed to find additional potential impacts.

3. Deltakeeper, San Joaquin Raptor Rescue Center, Protect Our Water, and Central Valley Safe Environmental Network (collectively Deltakeeper), filed a writ petition against South San Joaquin Irrigation District (SSJID) and the State. The trial court found substantial evidence of potential impact on groundwater and concluded SSJID abused its discretion in adopting the negative declaration. SSJID appeals, arguing possible mootness and lack of substantial evidence. Deltakeeper cross-appeals, complaining the trial court denied a motion to augment the record and failed to find additional potential impacts.

This appeal thus involves three cases, to which we shall refer as the Oakdale case, the Merced case, and the SSJID case. Other related cases involving other irrigation districts were simultaneously heard in the trial court but are not at issue in this appeal.

We shall reverse the judgment in the Oakdale case, because the shortened comment period caused prejudice. We shall affirm the judgments in the Merced and SSJID cases, because evidence of potential impacts made the negative declarations inappropriate.[6]

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[6] The parties have filed various requests for judicial notice. We previously granted one request, denied another, and deferred ruling on two others. We now deny as unnecessary the State's request for judicial notice dated February 23, 2006. We also deny as unnecessary Deltakeeper's supplemental request (dated

FACTUAL AND PROCEDURAL BACKGROUND

1. The Oakdale Case

Oakdale's district, located in eastern Stanislaus County and southeastern San Joaquin County, delivers water to irrigate pastures and agricultural land in the Stanislaus River watershed. Oakdale maintains over 330 miles of lateral canals and pipelines, 110 miles of drains, and 40 miles of main canals. About 15 percent of the facilities are lined ditches and cement pipelines; the remainder are dirt-lined or clay-lined ditches. Oakdale's canals drain into the Stanislaus River, Lone Tree Creek, and Dry Creek -- all of which are tributaries of the San Joaquin River.

Since 1985, Oakdale has applied aquatic pesticides to its irrigation system as part of its pesticide application program to control weeds and algae that interfere with water conveyance and clog waterways and irrigation machinery. The pesticides used are Magnacide H (acrolein), Rodeo/AquaMaster (glyphosate), copper sulfate, and Clearigate (copper as elemental). Before this case arose, the program had never been required to undergo CEQA review.

In 2001, the Ninth Circuit Court of Appeals held that irrigation canals that contribute water flow to a natural stream or water body are "waters of the United States" subject to the federal Clean Water Act (33 U.S.C. § 1311 et seq. (CWA)), and

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February 23, 2006) for judicial notice of a memorandum of (nonparty to the appeal) Turlock Irrigation District.

discharges of pollutants into waters of the United States require an NPDES permit (33 U.S.C. § 1342). (*Headwaters, Inc. v. Talent Irrigation Dist*. (9th Cir. 2001) 243 F.3d 526, 532-535 (*Headwaters*).) NPDES permits may be administered by the state. (33 U.S.C. § 1342(b).) In California, permits are administered and standards set by the SWRCB and the Regional Water Quality Control Board (RWQCB) in the Policy for Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California, also known as SIP or CTR (California Toxics Rule). (SWRCB Resolution No. 2000-015 (www.waterboards.ca.gov/resdec/resltn/2000/rs2000-015.htm; Aug. 23, 2006), amended by Resolution No. 2000-030 (www.waterboards.ca.gov/resdec/resltn/2000/rs2000-030.htm; Aug. 23, 2006)). The NPDES permit prohibits pesticide concentrations in excess of the specified limits outside a treatment area any time after pesticide application begins, and inside a treatment area when treatment ends. (33 U.S.C. § 1251 et seq.; Water Code, §§ 13370-13389.)

Section 5.3 of the CTR allows for exceptions from its requirements for pest management conducted by public entities. In order to qualify for an exception from the requirement to meet permit limitations that will achieve compliance with water quality standards and objectives, a public entity must comply with the requirements list in section 5.3 for categorical exceptions, including providing CEQA documentation.

In response to *Headwaters, supra,* 243 F.3d 526, SWRCB in 2001 granted to irrigation districts (including Oakdale) an

interim NPDES general permit[7] (Order No. 2001-12-DWQ), granting a temporary exemption from the water quality objectives. The interim permit would expire on January 31, 2004, by which point the districts were expected to apply for a general permit, with CEQA review if they wanted a section 5.3 exception. SWRCB later set February 2, 2004, as the deadline to apply for a general permit and section 5.3 exception.

In October 2003, Oakdale retained a consultant -- URS Corporation -- to help with the CEQA process (as did the other irrigation districts at issue in this appeal).

(Deltakeeper accuses Oakdale of intentionally delaying the CEQA process, while Oakdale says it did not learn CEQA review might be required until August 2003. For our purposes, it does not matter why it took Oakdale--or the other districts--so long to start their CEQA review. What *does* matter is whether CEQA was violated.)

The consultant, URS Corporation, prepared for Oakdale an "initial study,"[8] dated December 18, 2003, describing the pesticide program and concluding the program would not have a

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[7] A "general permit" applies to a category of sources (here, dischargers of aquatic pesticides) rather than to an individual source. (See *Waterkeepers N. Cal. v. AG Indus. Mfg*. (9th Cir. 2004) 375 F.3d 913, 915.)

[8] An initial study is a preliminary analysis prepared by the lead agency to determine whether an EIR or a negative declaration must be prepared or to identify the significant environmental effects to be analyzed in an EIR. (Guidelines, §§ 15365, 15063.)

significant effect on the environment. Oakdale accordingly proposed to adopt a negative declaration rather than prepare an EIR.

On December 19, 2003, Oakdale released its initial study and notice of intent to adopt a negative declaration. (§ 21092.3.) The notice of intent stated in part: "The public review period is from December 19, 2003 to [Tuesday] January 20, 2004. [Oakdale's] Board of Directors will also consider comments at its meeting on January 20, 2004. Final adoption of the Negative Declaration will be considered at the Board of Directors meeting on January 20, 2004."

Oakdale also submitted the documents to the State Clearinghouse, which established a 30-day time period for review by state agencies (which would also apply to review by the public). (§ 21091, subd. (b);[9] Guidelines, §§ 15023, subd. (c) [Clearinghouse shall be responsible for distributing environmental documents to state agencies for review and comment], 15073,[10] 15205, subd. (d) [when a negative declaration

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[9] Section 21091, subdivision (b), provides in part: "If the proposed negative declaration or proposed mitigated negative declaration is submitted to the State Clearinghouse for review, the review period shall be at least 30 days, and the lead agency shall provide a sufficient number of copies of the document to the State Clearinghouse for review and comment by state agencies." (§ 21091, subd. (b).)

[10] Guidelines, section 15073 provides in part: "When a proposed negative declaration or mitigated negative declaration and initial study are submitted to the State Clearinghouse for review by state agencies, the public review period shall not be less than 30 days [unless otherwise approved by the

is submitted to the Clearinghouse for review, the review period set by the lead agency shall be at least as long as the period provided in the state review system operated by the Clearinghouse, which is normally 30 days for negative declarations].)

The Clearinghouse's website indicated it received Oakdale's documents on December 19, 2003, and the review period would begin on that date and end on January 19, 2004. In the trial court, the State conceded this was a mistake because January 19, 2004, was a state holiday (Martin Luther King, Jr. Day), such that the last day for public comment should have been January 20, 2004.

On January 20, 2004, at a 9:00 a.m. board meeting, Oakdale adopted the negative declaration, which stated in part that the program was a continuation of the same program that had been in effect since 1985 and was necessary to control weeds and algae that clog waterways and interfere with irrigation machinery. Oakdale concluded there was no substantial evidence that the program may have a significant effect on the environment.

Deltakeeper, which had not submitted any comments during the comment period, filed a writ petition and declaratory relief complaint in the trial court, asserting the State's method of

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Clearinghouse]. [¶] (b) When a proposed negative declaration or mitigated negative declaration and initial study have been submitted to the State Clearinghouse for review by state agencies, the public review period shall be at least as long as the review period established by the State Clearinghouse." (Guidelines § 15073, subds. (a), (b).)

calculating the time period for public comment by including the day of distribution was improper (which we need not address). Deltakeeper also argued the comment period improperly ended on a holiday, and the time period should have ended at the close of business on January 20, 2004, such that the 9:00 a.m. vote on that date was premature. The pleading further alleged Oakdale abused its discretion in adopting the negative declaration rather than preparing an EIR.

In a motion for summary judgment, the State (1) defended its method of calculating the time for public comment (which we need not address), and (2) acknowledged error in failing to notice the 30th day was a holiday, but argued the error was not prejudicial.

Deltakeeper moved for summary adjudication against the State, asserting the State's computation method was invalid, and shortening the time period by one day was inherently and factually prejudicial.

Following briefing of the motions and the writ petition, the trial court heard oral argument on all issues in October 2004.

On November 24, 2004, the trial court issued its decision, concluding (1) the State's method of computing time periods by including the day of distribution was valid; (2) the failure to exclude the holiday from the time period for Oakdale's documents violated CEQA, but the violation was not prejudicial; (3) there was not enough evidence of potential environmental impacts to obligate Oakdale to prepare an EIR. The trial court accordingly

granted summary judgment in favor of the State. Though the court did not expressly deny Deltakeeper's motion for summary adjudication, the court denied the declaratory relief complaint, and ordered that judgment be entered in favor of the State. Final judgments were entered in favor of Oakdale and the State on March 24 and 25, 2004.

Deltakeeper appeals.

2. The Merced Case

Merced's district, covering Merced and Mariposa Counties, encompasses about 815 miles of irrigation conveyance system, including canals (earthen-lined and concrete-lined), manmade earthen-lined regulating reservoirs, underground pipelines, and sections of natural creeks. Water released from Lake McClure flows down the Merced River and is diverted into the mostly manmade canal system. There are bypass systems with control gates into the Merced River, Bear Creek, Black Rascal Creek, Owens Creek, Miles Creek, Duck Slough, Canal Creek, Deadman Creek, Dutchman Creek, Chowchilla River, and other channels. The Merced River flows into the San Joaquin River.

Since 1972, Merced has applied aquatic herbicides and algaecides to clear the canals of aquatic weeds and algae that can clog the canals and pipelines and interfere with the operation of the equipment farmers use to irrigate their fields. Merced's pesticide program applies acrolein, copper sulfate, copper carbonate, and flouridone directly into the irrigation canals, and applies glyphosate to vegetation along the banks of the canals.

In order to obtain the new NPDES permit and section 5.3 exception, Merced prepared an initial study and proposed negative declaration under CEQA.[11]

As set forth in our discussion *post*, Deltakeeper submitted comments, to which Merced responded (though Merced asserts it was not required to respond).

On January 30, 2004, Merced adopted the negative declaration stating: "The Proposed Project is the continuation of an aquatic pesticide application program by [Merced] since 1972. The program was previously regulated in 2002 and 2003 under the [SWRCB] [NPDES permit]. The proposed program would occur under a new General Permit in 2004 and is expected to be equivalent to the current program. The proposed program would be implemented for a period of approximately 5 years, or for the term of the new General Permit."

The negative declaration concluded: "There is no substantial evidence that the Proposed Project may have a significant effect on the environment. There would be no new construction or alteration of facilities; no new irrigation of lands; and no substantial changes in the operation of the irrigation water conveyance facilities. The proposed treatments

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[11] In a footnote in its appellate brief, Merced asserts it did not anticipate exceeding discharge limitations and therefore did not really need the section 5.3 exception, but decided it was prudent and in the public interest to proceed with a CEQA analysis. We do not view this footnote as asserting inapplicability of CEQA as a ground for reversal of the judgment.

are not likely to have a substantial adverse effect, either directly or through habitat modifications, on special-status species over existing conditions."

On February 25, 2004, Deltakeeper filed in the trial court a petition for writ of mandate and complaint for declaratory relief, against Merced and the State, alleging (1) Merced abused its discretion by adopting a negative declaration instead of preparing an EIR, and (2) the public comment period was too short.

The trial court found substantial evidence supported a fair argument that the project may have a significant impact on (1) natural habitat and (2) groundwater (due to acrolein seeping from unlined irrigation canals). On March 24, 2005, the trial court entered judgment granting the petition and ordered issuance of a writ of mandate, directing Merced to set aside its approval of the pesticide program and negative declaration.

The trial court denied Merced's motion for a new trial.

3. The SSJID Case

SSJID is located in San Joaquin County and covers approximately 68,000 acres of farmland in San Joaquin and Stanislaus Counties, around the cities of Manteca, Ripon, and Escalon. Its main distribution canal is about 26 miles long. It also has about 31 miles of lateral canals, 311 miles of underground pipelines, and 57 miles of drain ditches. SSJID also has about 25 drain locations where water can leave the district facilities and enter into the Lone Tree Creek/Little John Creek system or SSJID's French Camp Outlet Canal, both of

which enter the San Joaquin River. SSJID also has five locations where waters can be released into the Stanislaus River.

SSJID prepared an initial study of its aquatic pesticide program and a proposed negative declaration that stated in part:

"The Proposed Project is the continuation of an aquatic pesticide application program by [SSJID] since 1986. The program was previously regulated in 2002 and 2003 under the [SWRCB] Statewide General [NPDES] Permit for Discharges of Aquatic Pesticides (Water Quality Order No. 2001-12-DWQ, General Permit No. CAG990003). The proposed program would occur under a new General Permit in 2004 and is expected to be equivalent to the current program. The proposed program would be implemented for a period of approximately 5 years, or for the term of the new General Permit.

"[SSJID] applies aquatic pesticides to its irrigation conveyance system to control weeds and algae that interfere with irrigation conveyance and clog waterways and irrigation machinery. To conserve water and maximize the efficiency of irrigation, many landowners currently use sprinkler, drip, or micro-irrigation systems. These systems require irrigation water to be clean and free of vegetative debris that will clog machinery."

The negative declaration concluded, "There is no substantial evidence that the Proposed Project will have a significant effect on the environment. There would be no new construction or alteration of facilities; no new irrigation of

lands; and no substantial changes in the operation of the irrigation water conveyance facilities. The proposed treatments are not likely to have a substantial adverse effect, either directly or through habitat modifications, on special-status species over existing conditions."

SSJID received public comments and prepared written responses, as we discuss *post*.

On January 27, 2004, SSJID adopted the negative declaration.

Deltakeeper filed its petition for writ of mandate and declaratory relief complaint against SSJID and the State. The trial court found the negative declaration was improper because substantial evidence supported a fair argument that the program may have a significant impact on groundwater due to leaching of acrolein.

On March 24, 2005, the trial court entered judgment granting the petition and ordering issuance of a writ of mandate in favor of Deltakeeper, ordering SSJID to set aside its approval of the pesticide program and the negative declaration. The court denied SSJID's motion for a new trial.

SSJID appeals, and Deltakeeper cross-appeals.

DISCUSSION

I. CEQA Principles and Standard of Review

With limited exceptions (not invoked by the irrigation districts in this appeal), a public agency must prepare an EIR when substantial evidence supports a fair argument that a proposed project may have a significant effect on the

environment, i.e., a substantial, or potentially substantial, adverse change in the environment. (§§ 21068, 21080, 21082.2, 21100, 21151; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927 (*Pocket Protectors*).) When substantial evidence supports such a fair argument, an EIR must be prepared, even if the record also contains substantial evidence that the project will not have a significant effect on the environment. (*Pocket Protectors, supra*, 124 Cal.App.4th at p. 927.) Substantial evidence means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. (Guidelines 15384, subd. (a); *Pocket Protectors, supra*, 124 Cal.App.4th at p. 927.) Substantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (Guidelines 15384, subd. (b).) The fair argument standard is a low threshold test. (*Pocket Protectors, supra*, 124 Cal.App.4th at p. 928.) It is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the agency's determination. Review is de novo, with a preference for resolving doubt in favor of environmental review. (*Id*. at p. 928.)

II. Analysis

A. The Oakdale Case

Deltakeeper argues (1) the State's method of calculating the time period for public comment improperly includes the day the Clearinghouse distributes proposed negative declarations,

contrary to the general rules of the Code of Civil Procedure; (2) the State improperly closed the comment period on a holiday, Martin Luther King, Jr. Day, and Oakdale improperly adopted the negative declaration at a *9:00 a.m.* board meeting the day after the holiday instead of allowing the full day for public comment; and (3) Oakdale violated CEQA by adopting the negative declaration instead of preparing an EIR. We need not address the first and third points, because we shall conclude that closing the comment period on a holiday and adopting the negative declaration at a 9:00 a.m. meeting on the day after the holiday, instead of allowing the full day for public comment, constituted prejudicial CEQA error, requiring reversal of the judgment.[12]

It is undisputed that the time period for public comment in the Oakdale case was improperly cut short by one day because of the Monday holiday and the 9:00 a.m. board meeting on the day after the holiday. The final day for public comment should have been Tuesday, January 20, 2004, and the public should have had the entire day to submit comments, until the close of business

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[12] Deltakeeper argues we should address the State's method of calculating time periods because it poses an issue of broad public interest that is likely to recur and, contrary to the State's position, is not resolved by recent amendments to CEQA. We decline to address the issue.

on that day. Instead, Oakdale adopted the negative declaration at its *9:00 a.m.* meeting on January 20, 2004.[13]

The issue on appeal is whether this CEQA violation invalidated the negative declaration.

We shall conclude the violation caused actual prejudice requiring reversal (and we therefore need not address the parties' arguments as to whether or not the CEQA violation was prejudicial per se). (But see, e.g., *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 622-623 [failure to obey provisions that go to the heart of CEQA protective measures is generally prejudicial].)

Whether a procedural violation involves a prejudicial abuse of discretion turns on whether the error resulted in the omission of relevant information from the environmental review process--even where the information would not have altered the agency's ultimate decision to approve a project. (*Neighbors of*

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[13] The State's brief on appeal says, "The State has conceded that due to an inadvertent failure to enter a holiday in its computer, the State Clearinghouse only provided state agencies with 29 days to review the negative declaration." Oakdale's brief on appeal defines the issues as "whether the inadequacy of [Oakdale's] public notice and its failure to note the time of the Board meeting constituted a per se or presumed prejudicial abuse of discretion, and if it did not constitute a per se or prejudicial abuse of discretion, whether it constituted actual prejudice." Oakdale's brief also says the trial court properly determined that "even though [Oakdale's] notice was defective," the defects were not prejudicial. Thus, Oakdale has abandoned the argument it made in the trial court that the 9:00 a.m. meeting was acceptable because the law does not recognize fractions of days.

Cavitt Ranch v. County of Placer (2003) 106 Cal.App.4th 1092, 1100.)

In support of its petition for writ of mandate, Deltakeeper on August 16, 2004, submitted to the trial court a declaration of its attorney, Ellison Folk, stating he first learned of Oakdale's proposed negative declaration on Thursday, January 15, 2004, was unable to submit comments due to the intervening weekend and holiday, but would have submitted comments (similar to comments Deltakeeper submitted to other districts concerning similar pesticide programs) had Oakdale kept its comment period open until the end of the day on January 20, 2004, and acted on the program at its next regularly scheduled board meeting on February 3, 2004.[14]

Supporting Folk's declaration is the fact that on January 20, 2004, Deltakeeper submitted written comments to another irrigation district's notice of intent to adopt a negative declaration (Merced), as reflected in the administrative record of the Merced case (of which we take judicial notice in this consolidated appeal).

The trial court sustained evidentiary objections to the August 2004 Folk declaration. The trial court viewed the Folk declaration as an improper attempt to augment the record.

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[14] Oakdale argues it could have scheduled a board meeting on 24-hours notice, i.e., on January 21, 2004. For purposes of this appeal, it does not matter when the board meeting might have been scheduled.

The trial court also sustained an evidentiary objection, on hearsay grounds, to paragraph 5 of the Folk declaration (relating an asserted conversation between a citizen, Steve Burke, and Oakdale). However, the court overruled an objection to the filing of a declaration by Steve Burke himself, in which he stated that he is executive director of Protect Our Water; he first learned of Oakdale's proposed negative declaration on January 15, 2004, when he checked the State Clearinghouse CEQAnet Database; he called Oakdale on January 20, 2004, to obtain a copy of the initial study and proposed negative declaration, but Oakdale would not provide copies electronically and informed Burke that Oakdale had already approved the pesticide program that morning.

Folk also submitted a supplemental declaration (in response to defense claims that the first declaration was irrelevant), stating that Deltakeeper did not learn of Oakdale's intention to approve the pesticide program with a negative declaration until Folk (as its attorney) learned of it. Folk further attested he first learned on January 22, 2004, that Oakdale had already approved the program, and Folk wrote to Oakdale complaining of the violation of CEQA's notice requirement.

The trial court noted no specific evidentiary objection had been made to the supplemental Folk declaration submitted October 4, 2004, but the court said the supplemental declaration did not cure the evidentiary defects of the original declaration with regard to the Oakdale case.

On appeal, Deltakeeper argues the trial court erred in excluding portions of Folk's original declaration as being outside the administrative record, because the evidence was submitted for the sole purpose of demonstrating prejudice. We agree with Deltakeeper.

Extra-record evidence may be admissible in traditional mandamus proceedings to prove that the agency did not proceed as required by law, as when petitioners raise issues such as procedural unfairness. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 574-576, 578, & fn. 5; *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 706.)

Here, Deltakeeper sought to use extra-record evidence simply to show prejudice. Indeed, Oakdale *insists* that Deltakeeper show prejudice (rather than rely on prejudice per se) because section 21005, subdivision (b), states: "It is the intent of the Legislature that, in undertaking judicial review pursuant to Sections 21168 and 21168.5, courts shall continue to follow the established principle that there is no presumption that error is prejudicial." We conclude it was appropriate to use extra-record evidence to show Deltakeeper would have submitted comments had Oakdale afforded the full time period required by CEQA. This is not to say that such a showing could be made by a mere declaration that the declarant would have submitted comments. Here, we have more than that. We have the fact that Deltakeeper did in fact submit comments to another irrigation district involving a similar pesticide program on

January 20, 2004, which supports the claim that Deltakeeper would have submitted comments to Oakdale but for the premature cutoff of the time period.

In its respondent's brief on appeal, Oakdale argues Deltakeeper has forfeited its challenge to the evidentiary ruling by failing to address that the trial court excluded the Folk declaration as untimely. However, we see nothing in the cited record indicating the trial court excluded the evidence as untimely. It appears Oakdale is referring to Deltakeeper's failure to make the evidence part of the administrative record by timely augmentation of the administrative record. However, Deltakeeper *has* addressed this issue in its opening brief, i.e., the evidence of prejudice was not required to be part of the administrative record.

Oakdale suggests Deltakeeper should have submitted late comments to Oakdale (after Oakdale's adoption of the negative declaration) and then moved to augment Oakdale's record. Oakdale cites no authority requiring such a course of action. The parties discuss *Ultramar, Inc. v. South Coast Air Quality Management Dist*. (1993) 17 Cal.App.4th 689, which said a party had satisfied its obligation to exhaust administrative remedies by objecting to the agency's failure to distribute a complete copy of the environmental assessment and requesting an extension of the comment period. (*Id*. at p. 701.) However, *Ultramar* does not stand for the proposition that Deltakeeper was required to request an extension. In *Ultramar*, the agency discovered it had omitted a chapter from the document shortly after the

February 22, 1991, mailing, and the agency mailed the missing chapter on March 1, 1991, without extending the March 25 deadline. (*Id*. at p. 697.) The project opponent on March 18, 1991, requested an extension of the deadline for public comment. (*Id.* at p. 701.) This satisfied section 21177, which states in part: "No action or proceeding may be brought pursuant to Section 21167 [alleging that an agency improperly determined whether a project may have a significant effect on the environment] unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." (§ 21177, subd. (a).) However, section 21177 "does not apply to any alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law." (§ 21177, subd. (e).) Here, the alleged defect was failure to give the notice required by law, and therefore Deltakeeper was not required to present its complaint before close of the public comment period.

Oakdale and the State argue they showed absence of prejudice through affidavits from state agency representatives, stating their decision not to submit comments had nothing to do with any curtailment of the comment period. This argument lacks

merit. It does not matter whether others felt no prejudice if Deltakeeper was prejudiced.

Oakdale argues Deltakeeper is a sophisticated party familiar with environmental issues, had a duty to act equitably and in good faith, had actual knowledge of the Oakdale board meeting "four full days" before it happened, and easily could have contacted Oakdale and asked for an extension or "taken any number of other actions." This argument lacks merit. Three of the four days were Saturday, Sunday, and a Monday holiday. Oakdale acted at a 9:00 a.m. board meeting on Tuesday. Oakdale fails to show evidence of bad faith by Deltakeeper.

Oakdale next notes the trial court said it was speculative as to when the Oakdale board meeting would have taken place had the meeting been put off to keep the comment period open until the close of business. Oakdale claims that, in order to show prejudice, Deltakeeper was required to show it would have submitted comments before the next board meeting, not before the next *scheduled* board meeting. Oakdale says it could have scheduled a meeting on short notice (24 hours). However, even assuming Oakdale could have scheduled a board meeting for January 21, 2004, the fact that Deltakeeper submitted comments opposing the pesticide program of another district (Merced) on January 20, 2004, is adequate for purposes of this appeal to show Deltakeeper would have submitted comments but for the premature cut-off of the Oakdale comment period.

We conclude with respect to the Oakdale case that the trial court erroneously excluded evidence showing Deltakeeper was

prejudiced by the CEQA violation cutting off the time period for public comment on Oakdale's proposed negative declaration.

We shall reverse the trial court's judgments in favor of Oakdale and the State, and we direct entry of judgment in favor of Deltakeeper, commanding Oakdale to set aside its negative declaration and take further action as required by CEQA.

B. The Merced Case

1. Merced's Appeal

Merced contends it did not abuse its discretion by adopting the negative declaration instead of preparing an EIR. We disagree.

a. Potential Impact on Natural Habitat

Merced argues the trial court erred in finding substantial evidence to support a fair argument of a significant impact on natural habitat, rendering the negative declaration a violation of CEQA. As indicated, we review the agency's decision and do not defer to the trial court's decision. We shall conclude substantial evidence supports a fair argument of a significant impact on natural habitat, such that an EIR should have been prepared.

Merced's initial study spoke of a general threat that the pesticides could cause to the type of wildlife commonly found in aquatic habitats, including several special-status species, but Merced failed to specify whether or not any wildlife actually existed in its affected areas. Thus, Merced's initial study said, "Application of the proposed aquatic pesticides to irrigation conveyance systems would potentially affect eight

special-status species that utilize aquatic habitats associated with these facilities [list of species]. Special-status terrestrial species that could be affected by the proposed project are those that utilize the water conveyance systems for foraging, movement or breeding. Potential effects could include direct exposure to various chemical compounds or indirect effects associated with physical disturbance and/or disruption of food web dynamics."

Without identifying what wildlife actually was present, Merced's initial study concluded the program would have "less than significant" impact on riparian habitat and stated: "The water conveyance facilities proposed for treatment with aquatic pesticides have *very limited* riparian habitat because the facilities are *typically lined with concrete* and maintained to reduce obstructions to water flow. Therefore, the proposed project would not have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the DFG [Department of Fish & Game] or USFWS [United States Fish & Wildlife Service]." (Italics added.)

However, contrary to the assertion that facilities are "typically lined with concrete," Merced's initial study elsewhere showed Merced treats an estimated 325 miles of *unlined* canals (as opposed to 80 miles of lined canals) with Magnacide H (acrolein); 620 miles of *unlined* canals (as opposed to 108 miles of lined canals) with Rodeo/AquaMaster (glyphosate); and 245 miles of *unlined* canals (as opposed to 80 miles of lined canals)

with copper sulfate. The initial study further showed Merced treats 16 miles of natural creek beds and 12 miles of drains with glyphosate, and treats a 49-acre reservoir with acrolein, glyphosate, and copper sulfate.[15]

The initial study also said, "Merced Irrigation District implements operational procedures that prevent treated water from entering most natural streams (see 6.8, a), wetlands or other natural aquatic habitats," so its program would not interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors.

Merced argues it appropriately found its ongoing application of aquatic pesticides, which have occurred continually since 1972, would not result in any significant impacts on the existing physical environment, because continuation of the longstanding program does not involve any new or expanded activities or changes in the surrounding environmental conditions as those conditions have existed for years. Merced points out the only reason it did any CEQA analysis was that SWRCB required CEQA documentation in order to obtain the new statewide general permit. Merced argues that, where CEQA review is undertaken for a longstanding, ongoing activity, the environmental "baseline" is defined as the

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[15] Our resolution of this appeal does not require us to address an assertion in Merced's appellate brief that it uses glyphosate primarily in non-aquatic applications along the banks of canals, which are not part of the aquatic pesticide program.

environmental conditions as they exist at the time of the CEQA review, and it is this baseline of existing conditions that is used to determine whether any significant impacts could occur. Merced cites inapposite authority concerning statutory exemptions from CEQA for existing facilities--inapposite because Merced does not invoke any statutory exemption. Merced also cites authority that CEQA concerns itself with *changes* to existing conditions. (§ 21151, subd. (b);[16] Guidelines 15125(a),[17] 15126.2(a).[18])

Given the context in which CEQA review occurred in this case, Merced's argument lacks merit. Thus, Merced was ordered

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[16] Section 21151 requires preparation of an EIR on any project that may have a "significant effect on the environment," meaning "substantial, or potentially substantial, adverse *changes* in physical conditions which exist within the area as defined in Section 21060.5 [area includes land, air, water, etc.]." (§ 21151, subds. (a), (b); italics added.)

[17] Guidelines, section 15125(a) states: "An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (Guidelines, § 15125(a).)

[18] Guidelines, section 15126.2(a) states in part: "In assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced." (Guidelines, § 15126(a).)

to conduct CEQA review by the SWRCB in order to obtain an NPDES permit under the federal CWA. The purpose of such a permit is to insure that a public agency's use of pesticides in water does not contaminate public waters or surrounding lands. To allow Merced to evade environmental review of pesticide use on the ground that "we have been doing this for a long time" would sanction possible continuing contamination and pollution, thereby frustrating the very reason CEQA review was ordered in the first place: to determine whether current conditions justify issuance of NPDES permits.

But even if we assume that Merced could rely on "existing conditions" to determine whether to prepare an EIR, Merced's arguments fail.

Thus, the same authorities relied on by Merced refer to changes to "existing conditions," and Merced ignores the obvious: It had to identify existing conditions before it could determine whether the program would cause any changes to existing conditions. Merced failed to identify existing conditions. It failed to identify what wildlife was present. Instead, Merced merely suggested (incorrectly) that wildlife probably was not present because its canals were lined with concrete. This was insufficient to satisfy Merced's burden to identify the existing conditions.

Alternatively, Merced implicitly assumed that if any wildlife was present at this point (after 30 years of the pesticide program) then the pesticides must not have a significant adverse impact. This latter assumption would be

unwarranted, because we do not know, for example, whether wildlife population in Merced's canals has decreased over the past 30 years. This does not mean we are applying a 30-year-old baseline. Rather, the point is that if Merced wants to rely on the present existence of wildlife to show absence of adverse impact, it must prove its point, i.e., it must show the present level of wildlife does not reflect a degradation attributable to past applications of Merced's pesticide program. We therefore reject Merced's argument that it was Deltakeeper's burden to prove degradation.

Merced claims its position is supported by our decision in *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270 (*Fat*). We disagree. In *Fat*, the county approved a negative declaration and conditional use permit allowing private parties to operate and expand a public airport. The Fats complained the county failed to consider the impact of noise and possible crashes on future residents of adjacent land. The county responded an EIR was unnecessary because the proposed project did not result in additional noise or safety impacts beyond those already existing from on-going aircraft operations, and existing noise/safety impacts would be mitigated through implementation of standards contained in the comprehensive land use plan. (*Id*. at p. 1274.) The issue on appeal was whether the county abused its discretion in using the physical conditions that existed in 1997 (when the application for the conditional use permit was submitted), as the baseline for deciding whether the proposed project would result in significant environmental impacts. (*Id*. at pp. 1272-

1273.) The Fats, citing another Third Appellate District opinion (*Lewis v. Seventeenth Dist. Agricultural Assn*. (1985) 165 Cal.App.3d 823), argued that, since there had been no prior CEQA review, the baseline should be 1970--the year CEQA was enacted. (*Fat, supra*, 97 Cal.App.4th at p. 1275.) In *Fat*, we concluded substantial evidence supported the County's decision to use the 1997 baseline. The area remained largely agricultural with low population density. The Airport Land Use Commission conducted an environmental review in 1992 and adopted a negative declaration, which was not challenged. Although there had been a 30-year period of airport expansion without county authorization and there was evidence of environmental damage during that period, the operators had finally applied for the conditional use permit in 1997, and the county could reasonably view the application as an opportunity to bring the airport under some level of county supervision for the first time. (*Id*. at p. 1281.)

Fat, supra, 97 Cal.App.4th 1270, does not assist Merced's appeal.

We conclude Merced's initial study was insufficient on its face.

Additionally, Deltakeeper showed evidence of a potential significant impact on natural habitat. Thus, consulting ecologist Diane L. Renshaw submitted a letter during the public comment period and photographs of locations she visited, showing (1) a beaver dam immediately downstream from a site where Merced applied pesticides on Bear Creek, and (2) crayfish burrows (food

for humans and wildlife) on an unlined irrigation channel. Renshaw stated, "there have been no surveys [by Merced and other districts] for . . . plants, or even surveys to identify possible habitat areas in the irrigation districts, and so it is not surprising they have not been observed."

Merced's response to Renshaw's letter was that riparian habitats and biological resources "are potentially present in some of the conveyance facilities that would be treated with aquatic pesticides. However, these resources are present despite previous applications of the same aquatic pesticides . . . . Therefore, the presence of the biological resources described in [Renshaw's] comment letter demonstrates that the proposed treatments would not significantly reduce the area or degrade the quality of these resources." We have already explained Merced cannot rely on such assumptions.

Thus, we reject Merced's argument that Renshaw's letter contained only unsubstantiated opinions, concerns, and suspicions. We have no need to address an assertion made in a footnote in Merced's appellate brief, that Renshaw did not state what canals she actually observed, and the one photograph she identified as a canal showed banks with no vegetation, with trees behind the canal bank.

We conclude substantial evidence supports a fair argument of potential adverse impact on natural habitat, rendering it an abuse of discretion for Merced to adopt a negative declaration rather than prepare an EIR. We need not address Merced's attacks on other aspects of Renshaw's letter, e.g., (1) her

assumption (without being an engineering expert) that equipment failure or operator error might at some time result in premature release of treated water, and (2) her assumption that acrolein is applied along the banks of the canals rather than into flowing water.

b. Potential Impact on Groundwater

Merced argues there was no substantial evidence supporting a fair argument of a significant impact on groundwater. We shall conclude Merced abused its discretion by adopting a negative declaration without adequate study of an acknowledged potential for acrolein-treated water to leach into groundwater.

Merced claims undisputed scientific evidence in the record demonstrates that use of Magnacide H (acrolein) in irrigation canals does not pose a hazard to groundwater. However, Merced cites no evidence in the record to support this assertion, as required by California Rules of Court, rule 14. Merced cites to its statement in its responses to public comments, in which Merced asserted, "To the District's knowledge, aquatic pesticides of the kind applied by the District have not been detected in the Merced Groundwater Basin," and "groundwater tests in the Merced Groundwater Basin suggest no detectable amounts of copper or acrolein (Merced Area Groundwater Pool Interests (MAGPI) groundwater database)." Merced goes on to offer citations to the record on other points, e.g., that the acrolein is applied in low concentrations, that it rapidly degrades in water (such that the federally-approved label says acrolein-treated water may be released to natural waterways

after six days), that Merced sometimes holds the water longer, and that "[a]crolein is metabolised easily in soil." Merced also cites its own assertion that there is no evidence of any significant volatile material escaping the canal system in the 31 years that the district has been applying acrolein.

Merced argues its reference to the MAGPI database constituted substantial evidence. However, aside from the ambiguity of the reference (that unspecified tests "suggest" no detectable acrolein) the existence of some evidence in favor of Merced does not resolve the appeal. If evidence exists on both sides of the debate, then an EIR should be prepared. (*Pocket Protectors, supra*, 124 Cal.App.4th at p. 935 [it is the function of an EIR, not a negative declaration, to resolve conflicting claims].) We disagree with Merced's suggestion that Deltakeeper was required to present expert evidence that acrolein has in fact been detected in the Merced groundwater basin.

Thus, Deltakeeper notes California includes acrolein as a potential groundwater contaminant in its groundwater protection list. (Food & Agr. Code, § 13145, subd. (d); Cal. Code Regs. tit. 3, § 6800(b).)

During the comment period, Deltakeeper (noting Merced's acknowledgement that water might be irrigated out prior to the six-day holding period) expressed concern that water contaminated with acrolein would contaminate soils. Deltakeeper submitted a copy of a declaration from Dr. Glenn Miller, an environmental sciences professor, which was prepared for an unrelated federal court case (*Headwaters, supra,* 243 F.3d 526)

but which discussed the general characteristics of acrolein. Dr. Miller declared, "Water percolating through soils or retained in soils will contain acrolein until the acrolein is transformed. Quantities of acrolein can be released as water rinses the contaminated soil. The concentration of acrolein in the final water will be related to the amount of water rinsing the soil and the amount of contaminated water trapped in the soil."

After these comments and similar comments were submitted to Merced, a URS consultant who worked on Merced's negative declaration communicated to Merced on January 26, 2004, (in an e-mail memorandum that is included in the administrative record) that the consultant conducted (we do not know when) a literature search for scientific information but "came up with . . . nothing about the potential of acrolein to leach to groundwater. However, the Spectrum Chemical Fact Sheet for acrolein does indicate that it is very mobile and water [*sic*] and does have the potential to leach. I think this is unlikely under the conditions of the irrigation canal applications (I'm assuming the soil under unlined canals is not very permeable, since you don't want to lose water, and acrolein is likely to degrade before it leaches), but the more we can document this with scientific data, the better. Once acrolein does get into groundwater, where conditions are anaerobic, degradation is much slower . . . . [¶] . . . [¶] I'm . . . going to contact RWQCB and try to find out if there has been any groundwater sampling for acrolein." The URS consultant who sent the e-mail, Lisa

Hunt, holds a B.S. degree in Environmental Systems Engineering, an M.S. degree in Environmental Engineering, eight years of experience, and expertise in hydrology and water quality, permitting, and monitoring.

The URS consultant thereafter drafted additional language, incorporated into Merced's above-quoted responses to public comments, stating in part: "While little information is available on the potential for acrolein to leach to groundwater, the soil beneath irrigation canals is unlikely to be sufficiently permeable to allow for significant leaching. Because acrolein dissipates rapidly from surface water, and water moves quickly down the canal during application, there is unlikely to be sufficient time for leaching to occur before removal of acrolein takes place." The consultant's draft did not refer to any MAGPI database. Her January 26 e-mail did say she was going to contact the regional water quality board to find out if there had been any groundwater sampling for acrolein. The fact that this was not done until four days before Merced approved the negative declaration shows how deficient the initial study was.

Four days before the negative declaration was adopted, Merced's own consultant was making assumptions rather than relying on actual testing of groundwater. The reference to a MAGPI database appears in responses to comments prepared between those two dates, not in the body of the initial study, and ambiguously refers to unspecified tests that "suggest" no problem.

This record supports Deltakeeper's arguments that (1) Merced failed to consider or failed adequately to consider groundwater impacts when it prepared its negative declaration, and (2) the record contains evidence supporting a fair argument that the program might adversely impact groundwater.

We disagree with Merced's argument that Deltakeeper's evidence is irrelevant because it does not prove acrolein actually migrates into the groundwater.

Deltakeeper asks us to take judicial notice of evidence in its similar case against Turlock Irrigation District, concerning the amount of water that leaks from unlined canals. Deltakeeper submitted this evidence to us in connection with the Oakdale case, in a request for judicial notice dated February 23, 2006. Oakdale opposed the request, and we denied the request as unnecessary (fn. 5, *ante*). The Turlock evidence is also unnecessary to our resolution of the appeal in the Merced case.

Merced maintains (without citation of authority) that we should presume its consultant was aware of facts and relied on facts to support her opinion that the soil under unlined canals was not highly permeable. However, Merced's consultant expressly stated she was "assuming" the soil was not highly permeable. The court owes an expert's conclusions no deference unless they are supported by the record. (*Pocket Protectors, supra*, 124 Cal.App.4th at p. 928.) Thus, this is not a case, as argued by Merced, where the project proponent provided expert evaluation requiring the opponent to come forth with opposing expert evaluation.

Merced suggests no harm could result from leaching, because it applies acrolein in very low concentrations. However, Merced fails to provide adequate factual analysis for appellate review of this point.

In a footnote, Merced suggests that, even if there is evidence that acrolein has an adverse impact on groundwater, it would not matter, because "the environmental baseline under CEQA includes preexisting environmental conditions. Because [Merced] is not proposing any changes to its longstanding aquatic pesticides program, there is no significant change to the environmental baseline." We disagree. Merced ignores the possibility of slow degradation, such that continuation of the program may adversely impact current conditions.

Merced's appellate brief, under the heading of "BACKGROUND," discusses federal, state, and local regulation of pesticides (e.g., under the Food and Agricultural Code and county agricultural permits). We need not address these other regulatory programs. Merced acknowledges it was required to comply with CEQA (in order to have the option of exceeding discharge limits on the pesticides). We conclude Merced's adoption of the negative declaration violated CEQA.

We conclude Merced fails to show grounds for reversal of the judgment in favor of Deltakeeper.

2. Deltakeeper's Cross-Appeal Against Merced

Deltakeeper cross-appeals from the judgment, arguing (1) additional grounds support setting aside the negative declaration, (2) at a minimum, the reliance on best management

practices to reduce significant impacts requires preparation of a *mitigated* negative declaration, and (3) the trial court should have granted Deltakeeper's motion to augment the administrative record with a letter from the National Oceanic and Atmospheric Administration (NOAA).

We need not address the latter two points because (a) a mitigated negative declaration is no longer an issue in light of the conclusion that Merced must prepare an EIR, and (b) the NOAA letter can be made part of the administrative record in the EIR process to come.

As to the first point -- additional grounds for setting aside the negative declaration -- Deltakeeper complains the trial court did not rule on its claims that (1) the initial study and negative declaration failed to identify potential impacts associated with its request for an exemption from water quality standards contained in the CTR, and (2) Merced improperly failed to evaluate impacts to water bodies to which the treated canals discharge.

Though not cited by the parties, section 21005, subdivision (c), states it is "the intent of the Legislature that any court, which finds, or, in the process of reviewing a previous court finding, finds, that a public agency has taken an action without compliance with this division, shall specifically address each of the alleged grounds for noncompliance." The apparent purpose of the statute, as noted by one commentator, is to avoid wasteful litigation of the same arguments being raised in subsequent rounds of litigation. (Remy et al., Guide to the

California Environmental Quality Act (10th ed. 1999) pp. 646-647.)

Here, however, Merced represents in its respondent's brief on the cross-appeal that things have changed since it performed the CEQA review that is the subject of this appeal, in that SWRCB adopted a general permit in May 2004 (after Merced completed its CEQA review) and a "Fact Sheet," which assertedly alters applicability of the water quality standards. Documentation about these subsequent events is part of the record in connection with SSJID's motion for new trial. (The trial court's denial of the motion for new trial is not challenged on appeal.) Since it appears subsequent action by SWRCB may affect the new CEQA review to be conducted by Merced following remand, it would be more wasteful for us to address claims on the cross-appeal that may be moot in the subsequent CEQA review. We therefore need not address the cross-appeal regarding water quality standards. (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 920 [§ 21005 does not require appellate court to address additional alleged deficiencies that may be addressed in a different manner upon subsequent CEQA review following remand].)

As to Deltakeeper's contention in the cross-appeal that Merced improperly failed to evaluate impacts to water bodies to which the treated canals discharge, we consider it wasteful for us to address this issue, because it turns on the state of the record, which may change in the subsequent CEQA review. Thus, Merced's response is that Deltakeeper fails to show substantial

evidence supporting its position and instead relies on evidence that was not part of the administrative record (the challenged NOAA letter) and comments that were not presented during the administrative process or were not adequately presented. For example, Merced says with respect to monitoring for releases of surfactants: "Had [Deltakeeper] raised this issue in their comments, the District could have addressed it." Since the preparation of an EIR will involve a new period for public comment, the issues raised in this cross-appeal may become moot in the subsequent CEQA review.

We conclude Deltakeeper's cross-appeal against Merced does not require us to alter the trial court's judgment.

C. The SSJID Case

1. SSJID's Appeal

a. Mootness

SSJID's opening brief on appeal contends this case should be stayed pending actions by state and federal agencies, because this case will be moot (1) if SWRCB's receiving water standards are confirmed, or (2) if the federal Environmental Protection Agency (EPA) adopts pending amendments to federal regulations governing the NPDES permit program. The EPA argument was already presented to this court in a separate motion to stay the appeal. We denied the motion and decline to revisit the matter. As to the argument concerning the SWRCB, SSJID does not show this case actually is moot but merely argues the case may become moot if certain events (further guidance by the SWRCB) happen. We accordingly reject the contention that this appeal is moot.

Under the same heading (that this proceeding should be stayed pending state agency action that may render the case moot), and the subheading, "If Receiving Water Standards Outlined By The SWRCB Are Confirmed, This Case Will Be Moot," SSJID argues this whole case is moot because the general permit adopted by SWRCB after SSJID's January 2004 negative declaration, as interpreted by a SWRCB fact sheet in May 2004, suggests that irrigation districts that apply pesticides to a closed irrigation system do not need a "section 5.3 exception" (and therefore do not need to perform CEQA review). SSJID argues that, under SWRCB's fact sheet, what matters is not how much pesticide is applied, but how much remains in the water after seven days. SSJID argues it has a practice of irrigating treated water out of the system within a day or two after treatment begins, and therefore it "clearly complies" with this standard.[19]

Although we explain elsewhere in this opinion that we view the subsequent SWRCB action as making it unnecessary for us to address claims raised in the cross-appeals, SSJID fails to establish mootness of the entire case. Indeed, even SSJID is not sure about its interpretation of the SWRCB fact sheet, because SSJID's appellate brief says, "The SWRCB will be providing further guidance on the receiving water limitation

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[19] SSJID develops this argument more fully in its respondent's brief to Deltakeeper's cross-appeal. However, because we reject SSJID's appeal, we are dismissing Deltakeeper's cross-appeal as moot.

issue (as well as the conditions under which a General Permit is needed) in light of [a 2005 Ninth Circuit Court of Appeals opinion] and SSJID will be seeking a clarification of the SWRCB's receiving water standards outlined above in light of that guidance. If the standards as described in the Fact Sheet are confirmed, a section 5.3 exception would be superfluous and this case would be moot." No subsequent clarification by SWRCB is before this court in this appeal.

SSJID did not raise this issue at the hearing on the merits of the petition in the trial court, even though the October 2004 hearing postdated the May 2004 SWRCB fact sheet upon which SSJID relies on appeal. SSJID argues this issue can nevertheless be considered on appeal because it presents only a question of law, not a question of fact. We disagree. Whether or not SSJID's activity requires a section 5.3 exception under the general permit presents factual issues.

SSJID did try to raise the issue in a motion for new trial, but the trial court rejected it and stated in a tentative ruling incorporated by reference into the court's written order: "The court's review pursuant to CEQA is limited to the action that was taken by [SSJID] and the record in support of it. The Initial Study and related documents describe the Aquatic Pesticide Program and indicate that the pesticides will be applied in different amounts and at different locations depending on the conditions. [Citation to administrative record.] The court can not [*sic*] rewrite the program to specify that the amounts which will be applied will not result in levels

in the waters which trigger the need for a section 5.3 exception. [¶] The court's judgment . . . does not preclude [SSJID] from approving an amended or a different 'project'. However, to apply the same aquatic pesticides pursuant to the same program as described in the Initial Study would violate the letter and the spirit of the court's ruling."[20]

On appeal, SSJID has not made an assignment of error as to the denial of its motion for new trial, nor has SSJID demonstrated any reversible error.

We conclude SSJID fails to establish that this case is moot.

b. Groundwater

SSJID argues no substantial evidence supports a fair argument that SSJID's continued use of Magnacide H (acrolein) may have a significant impact on groundwater. We disagree.

SSJID claims Deltakeeper advanced only one theory in its opening memorandum in the trial court, i.e., seepage out of the canals, but abandoned that theory in its reply memorandum and presented a new theory -- that acrolein could seep into groundwater from irrigated fields. SSJID claims the trial court rejected the new theory and adopted the abandoned theory. However, we see nothing in the pages of the record cited by

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[20] The judgment orders that "SSJID not reapprove the same [program] . . . unless and until it has fully complied with [CEQA]." The judgment may not be construed as prohibiting SSJID from approving an amended project, based on a new permit that does not require CEQA review.

SSJID to support its characterizations of what happened in the trial court. To the contrary, Deltakeeper's opening memorandum in the trial court clearly argued both seepage out of canals and leaching through soil of fields irrigated with treated water.

SSJID claims there is no substantial evidence of potential impact to groundwater, and Deltakeeper instead relied on (1) "naked assertions in a comment letter" by a layperson, and (2) work product of the URS consultant hired to help SSJID (i.e., URS's e-mail communication to SSJID and the other districts that "the Spectrum Chemical Fact Sheet for acrolein does indicate that it is very mobile and [*sic*] water and does have the potential to leach" and drafted responses to public comments that leaching was unlikely).

However, SSJID does not dispute the comment letter's assertion that acrolein has been identified as a potential groundwater contaminant.

Moreover, as to the evidence concerning the URS consultant (e-mail and draft responses), SSJID argues such "in-process documents are not supposed to be included in the administrative record," because preliminary documents are necessarily incomplete and subject to revision. In a footnote, SSJID acknowledges the trial court granted Deltakeeper's motion to augment the record to include these documents (over SSJID's opposition). However, SSJID does not assign error on this point. SSJID merely says in its footnote that it contends the trial court's ruling was erroneous, but that we do not need to reach the issue, because what is relevant here is the complete

and final responses by SSJID to the public comments. SSJID has thus forfeited any claim of evidentiary error. (Evid. Code, § 353; *Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1346; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

Thus, in this appeal we take into account URS's communication to the districts that acrolein does have the potential to leach. The potential for adverse impacts triggered the need for preparation of an EIR, making it immaterial whether the record also contained evidence arguably supporting a conclusion that acrolein would not significantly impact groundwater. (*Communities For A Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110.)

c. Continuing Nature of Program

Under a separate heading, SSJID argues that, because it was not proposing to change existing ongoing activities, there was no basis for the trial court's finding that a significant impact to the environment might result from continuation of its pesticide application program. We disagree.

SSJID cites, without discussion, *Silveira v. Las Gallinas Valley Sanitary Dist.* (1997) 54 Cal.App.4th 980. *Silveira* held no EIR was required where a sanitation district authorized the condemnation of ranch property adjacent to its sewage treatment plant, for use as an odor buffer zone, with no plan to alter the acquired property or the district's sewage treatment plant. (*Id*. at pp. 984-985.) The district merely acquired the property to prevent it from being developed into residential use that

might then require the district to pay for mitigation measures. (*Id*. at p. 991.) Thus, in *Silveira*, the "project" was mere acquisition of land. Here, the "project" involves application of pesticides to irrigation canals. *Silveira* has no bearing on the case before us.

That SSJID had been applying the pesticides for years is immaterial. The need for CEQA review was triggered by SWRCB's new permit requirement, which required SSJID to qualify for a new permit to continue the same pesticide application activities it had routinely undertaken for the past 16 years. SSJID argues existing facilities and ongoing activities are treated as an existing condition -- the environmental "baseline" -- and CEQA review is limited to *new* impacts that may result from *new or expanded* operations. We reject this argument for the same reasons we reject the similar argument made by Merced.

d. Other Regulatory Programs

In its statement of facts, SSJID describes federal and state regulation of pesticides, other than CEQA. In a footnote in its statement of facts concerning acrolein, SSJID cites case law for the proposition that compliance with label directions and permit requirements of other regulatory programs constitutes substantial evidence that no significant impacts would occur. SSJID develops this point into a full argument in its reply brief. Even though Deltakeeper addressed the point in its respondent's brief, we decline to consider this argument for failure to present it properly in the opening brief under an appropriate heading, as required by California Rules of Court,

rule 14. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19; *Heavenly Valley v. El Dorado County Bd. of Equalization, supra*, 84 Cal.App.4th at p. 1346; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

We conclude the judgment against SSJID should be affirmed.

2. Deltakeeper's Cross-Appeal Against SSJID

Deltakeeper cross-appeals against SSJID, arguing (1) additional grounds support setting aside the negative declaration, (2) at a minimum, a mitigated negative declaration was required to include mitigation measures, and (3) the trial court erroneously denied in part Deltakeeper's motion to augment the record.

As with Deltakeeper's cross-appeal against Merced, we need not address the latter two points because (a) a mitigated negative declaration is no longer an issue in light of the conclusion that SSJID must prepare an EIR, and (b) the evidence excluded by the trial court, as being outside the record, can be made part of the administrative record in the EIR process to come. Also, we need not address the first point insofar as it relates to water quality standards, because the subsequent action by SWRCB (referenced in our discussion of the cross-appeal against Merced) may change the scope of the new CEQA review.

Deltakeeper argues the record does not support SSJID's conclusion that the program will not cause significant impacts to biological resources. However, Deltakeeper's argument turns in part on the evidence excluded by the trial court. Since this

evidence presumably can be made part of the administrative record in the subsequent EIR process (or may become moot in the event subsequent SWRCB action makes CEQA review unnecessary, as we discuss *ante*), it is not necessary for us to decide the issue here.

As to Deltakeeper's contention in the cross-appeal that SSJID improperly failed to evaluate impacts to water bodies to which the treated canals discharge, we consider it wasteful for us to address this issue, because it turns on the state of the administrative record, which may change in the subsequent CEQA review. Thus, SSJID's respondent's brief on the cross-appeal states in part: "SSJID was not required to anticipate and respond to comments that were never made or questions that were never asked." Although the parties dispute the sufficiency of the current administrative record, the state of the record may change in the subsequent CEQA review.

We conclude Deltakeeper's cross-appeal does not require us to alter the trial court's judgment.

DISPOSITION

In the Oakdale Irrigation District case, the judgments in favor of the Governor's Office of Planning and Research and its acting director, Jan Boel, the State Clearinghouse and its director, Terry Roberts, and Oakdale Irrigation District are reversed, with directions for the trial court to enter judgment in favor of Deltakeeper and issue a writ commanding Oakdale Irrigation District to set aside its negative declaration and conduct further proceedings in conformity with the California

Environmental Quality Act. Deltakeeper shall recover its costs on appeal. (Cal. Rules of Court, rule 27(a)(1).)

In the Merced Irrigation District case, the judgment is affirmed. Deltakeeper, San Joaquin Raptor Rescue Center, Protect Our Water, and Central Valley Safe Environmental Network shall recover their costs on the appeal. (Cal. Rules of Court, rule 27(a)(1).)

In the South San Joaquin Irrigation District case, the judgment is affirmed. Deltakeeper, San Joaquin Raptor Rescue Center, Protect Our Water, and Central Valley Safe Environmental Network shall recover their costs on the appeal. (Cal. Rules of Court, rule 27(a)(1).)

With respect to all cross-appeals, the parties shall bear their own costs. (Cal. Rules of Court, rule 27(a)(4).)

SIMS, J.

We concur:

SCOTLAND, P.J.

BLEASE, J.